United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

T-6601 - 76-2139
To be argued by
STEPHEN FLAMHAFT

76-2139

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket # T-6601 - 76-2139

CHARLES PETERS

Appellant,

-against-

UNITED STATES OF AMERICA,

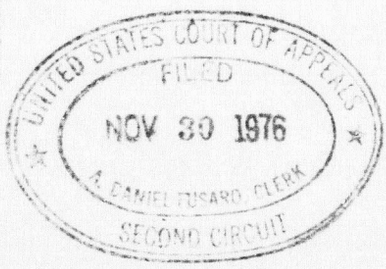
Appellee.

On Appeal From the United States
District Court for the Eastern
District of New York

APPENDIX FOR APPELLANT

STEPHEN FLAMHAFT
32 Court Street
Brooklyn, New YOrk 11201

B
P/s



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DIST/OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	$	DEMAND	OTHER	JUDGE NUMBER	JURY DEM.	DOCK YR.	DOCK NUM
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FILE COPY

PLAINTIFFS

PETERS, CHARLES

CHARLES PETERS

DEFENDANTS

U.S.A.

UNITED STATES OF AMERICA

CAUSE

28 USC 2255 - motion to vacate sentence.
Related case: 75CR 275.

ATTORNEYS

For PLNTFF:
CHARLES PETERS/pro se
Drawer "B"
Stormville, New York 12582

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARD	DATE
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UNITED STATES DISTRICT COURT DOCKET

DC-11

DETAILS [illegible]

PROCEEDINGS

2-2-76	Motion to vacate ~~SENTENCE~~ sentence filed. (1)
2-5-76	By PLATT, J. - Order to show cause dtd 1-24-76 filed (copies mailed as directed). (2)
3/8/76	Letter dated 4/5/76 filed from C Peters to Howard Burns (3)
4/15/76	Affidavit of Ethan Levin-Epstein filed in 76 C 598. ---
4/30/76	Affidavit of U.S.A. in opposition to consolidation applications filed. (4)
5-7-76	Before PLATT, J.-Case called. Motion for consolidation granted.
5-11-76	Letter dtd. 5-7-76 from G. Collins with petitioner's traverse filed in 76-C-545. ---
5-11-76	Letter dtd 5-3-76 to J. Platt from Asst US Atty filed in 76C 545. ---
5-12-76	Petitioner's traverse filed in 76C 545. ---
5-17-76	(Copy of letter to petitioner from J. Platt's Chambers filed. (5)
5-17-76	By PLATT, J-Memorandum & Order dtd 5-16-76 that a hearing be held on 10-1-76 at 11:00 am to determine the issues of fact. Ordered that Stephen Flamhaft is appointed to represent petitioner Peters, Mark J. Landsman is appointed to represent petitioner Collins and Raphael Scotto is appointed to represent petitioner Fiammia. Copies of this Mem & Order mailed to each of the petitioners, the U.S. Atty for the Eastern District, and to petitioners' newly and formerly appointed counsel. See 76C 545. mp ---
9-24-76	BY PLATT, J. - Writ of Habeas CORPUS ad testificandum for Charles Pete issued. ---
10-8-76	Before PLATT, J.- case called - petitioner and counsel present -petitic motion for an order pursuant to T 28 USC 2255 - hearing ordered and begun - hearing concluded - petitioner's motion is denied. - clerk to file notice of appeal. ---
10-13-76	Notice of appeal filed. Copy mailed to the C of A. (6)
10-18-76	Writ of habeas corpus in re motion to vacate ret and filed/executed.
10-25-76	Civil appeal scheduling order filed. (8)
11-1-76	By PLATT, J-(Copy) Order dtd 10-29-76 that petitioners' letter dtd 10-13-76 be accepted and filed as a timely notice of appeal, that petitoner's application for copies of the record of the hearing is granted, motion to prosecute w/o the required fees is granted, the request for counsel is denied etc filed. Copies mailed. (9)
11-1-76	Letter dtd 10-13-76 to J. Platt from petitioners filed in 76C 545. ---

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- against -

CHARLES PETERS,
GERARD COLLINS, a/k/a "Rebel",
PAUL FLAMMIO,
ROCCO MASTRANGELO, a/k/a "Rocky",
JOSEPH ADDOLORIA, a/k/a "Joe Baldy",
CHARLES FORBES and
GERALD BARRY,

Defendants.

- X

Cr. No. 75CR 275
(T. 18, U.S.C., §659, §371
§924(c)(1), (2) and §2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 3rd day of March 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", with intent to convert to their own use, did wilfully and knowingly embezzle, steal and unlawfully take from a motortruck belonging to the Arline Knitwear Company, Brooklyn, New York, a quantity of women's knitted garments, having a value in excess of One Hundred Dollars ($100.00), which goods were moving as and constituting an interstate shipment of freight from New York to New Jersey. (Title 18, United States Code, Section 659 and 2)

COUNT TWO

On or about and between the 1st day of January 1972 and the 7th day of March 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel",

PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky", JOSEPH ADDOLORIA, also known as "Joe Baldy", CHARLES FORBES and GERARD BARRY, along with Paul Fleischer, named herein as a co-conspirator but not as a co-defendant, and others known and unknown to the Grand Jury, did knowingly and wilfully conspire to commit offenses against the United States, in violation of Title 18, United States Code, Section 659, by conspiring to unlawfully take from a motortruck belonging to the Arline Knitwear Company, Brooklyn, New York, a quantity of women knitted garments, having a value in excess of One Hundred Dollars ($100.00), which goods were moving as and constituting an interstate shipment of freight from New York to New Jersey, and further, to unlawfully receive and have in their possession the said garments, the aforesaid defendants knowing the same to have been stolen.

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, within the Eastern District of New York and elsewhere, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky", JOSEPH ADDOLORIA, also known as "Joe Baldy", CHARLES FORBES and GERALD BARRY committed among others the following:

O V E R T A C T S

1. In or about January 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", along with co-conspirator Paul Fleischer met in Queens, New York.

2. On or about March 3, 1972, the defendant CHARLES FORBES had a telephone conversation with the defendant ROCCO MASTRANGELO, also known as "Rocky", in New York, New York.

3. On or about March 3, 1972, the defendant GERALD BARRY drove a tow truck from New Jersey to New York, New York. (Title 18, United States Code, Section 371).

COUNT THREE

On or about the 3rd day of March 1972, within the Eastern District of New York, the defendants CHARLES PETERS, GERARD COLLINS, also known as "Rebel", PAUL FLAMMIO, ROCCO MASTRANGELO, also known as "Rocky" and JOSEPH ADDOLORIA, also known as "Joe Baldy", knowingly, intentionally, wilfully and unlawfully carried and used a firearm, during their commission of an offense for which they may be, and are being, prosecuted in a Court of the United States, to wit: the theft of a quantity of women's knitted garments, having a value in excess of One Hundred Dollars ($100.00), which goods were moving as and constituting an interstate shipment of freight, in violation of Title 18, United States Code, Section 659, which offense is set forth in Count One above. (Title 18, United States Code, Sections 924(c)(1), (2) and Title 18, United States Code, Section 2)

A TRUE BILL.

Francis Wills
FOREMAN

Paul J. Curran
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

COUNSEL

On the previous [illegible] the defendant appeared in person [illegible] 11 21 [illegible]

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Thomas O'Brien, Esq.
(Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, count 3 [ ] NOLO CONTENDERE, [ ] NOT GUILTY

[illegible]

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

NOTILMED

Defendant has been convicted as charged of the offense(s) of violating T18, U.S.C.Secs.924(c)(2) and T-18, U.S.C.Sec. 2, in that on or about March 3, 1972, the defendant, with others, did knowingly, intentionally and unlawfully carried and used a firearm, during their commission of an offense for which they may be, and are being, prosecuted in a Court of the U.S., to wit: the theft of a quantity of women's knitted garments, having a value in excess of $100, whihh goods were moving/part of an interstate shipment of freight

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

IT IS ADJUDGED on count 3 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 8 years pursuant to T-18, U.S.Code, Sec. 4208(a)(2); sentence to run consecutively to any State sentence. On motion of Asst. U.S. Atty. Levin-Epstein counts 1 and 2 are dismissed.

SPECIAL CONDITIONS OF PROBATION

[illegible] NOV 2 1975 [illegible] PM

(52)

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[ ] U.S. District Judge

[ ] U.S. Magistrate

Thom C. Platt

Date 11/24/75

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

THE UNITED STATES OF AMERICA,

-against-

CHARLES PETERS,

Defendant.

- -x

75 CR 275

MEMORANDUM AND ORDER

February 26, 1975

PLATT, D.J.

Defendant, Charles Peters, has filed, pro se, a motion for reduction and/or modification of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. Defendant pled guilty to the crime of using a firearm in the commission of a felony (namely, theft of goods from a motortruck in interstate commerce, 18 U.S.C. § 659) in violation of Title 18 U.S.C. § 924(c)(1)(2). On November 21, 1975 the Court sentenced defendant to eight years imprisonment, with the provision that he would become eligible for parole at such time as the Board of Parole might determine. Title 18 U.S.C. § 4208(a)(2). The aforesaid sentence was to be served consecutively to the state prison sentence defendant is currently serving.

This motion does not attack the legality of the Court's sentence, rather, it is "essentially a plea for leniency," and presupposes a valid conviction. United States v.

Ellenbogen, 390 F.2d 537, 543 (2d Cir.), cert. denied, 393 U.S. 918, 89 S.Ct. 241, 21 L.Ed.2d 206 (1968).

The plea for the reduction of a lawful sentence is therefore addressed to the sound discretion of this Court. United States v. Bethany, 489 F.2d 91 (5th Cir. 1974).

The Court, upon reviewing the facts of Mr. Peters' sentence, is not persuaded that the factors raised by the defendant at this time are sufficient to warrant a reduction and/or modification of sentence under a Rule 35 motion. The Court gave full consideration prior to sentence to the fact that the defendant pled guilty rather than forcing the government to its proof in a trial.

ORDERED that defendant Peters' motion for reduction and/or modification of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure, be, and the same hereby is, denied.

The Clerk is directed to forward a copy of this memorandum and order to the defendant, Charles Peters 20273, Drawer B, Stormville, New York 12582.

U.S.D.J.

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
RESPONDENT

- against -

Charles Peters, N.Y.S., 20273
Petitioner

Notice of Motion
For Permission to
Appeal Belatedly

Ind. No. 75 CR 275

To: Honorable Court

Petitioner, Charles Peters, N.Y.S., 20273, respectfully submits this petition for the following reasons:

Petitioner avers that he is presently confined in Greenhaven Correctional Facility, Stormville, New York, 12582, serving a, seven year period of incarceration as a result of a Criminal conviction in Suffolk County, New York before the Honorable Judge Gordon Lipitz in jury-trial on the 28th day of March 1973.

Under date of November 21, 1975 petitioner was sentenced in Federal District Court for the Eastern District of New York by the Honorable Judge Thomas Platt, Jr., to a term of eight (8) years to run consecutively to the present State prison term petitioner is now serving. This consecutive sentence was predicated upon a conviction under Ind. No. 75 CR 275 by a plea of "Guilty" of the alleged offense "Possession of a Weapon". Petitioner was represented by court-appointed counsel, Mr. O'Brien, Esq.

"Jurisdiction"

Jurisdiction in this proceeding is conferred upon the Honorable Court pursuant to the provisions of Title 28, U.S.C., 2255, Rule 2-(C)-(D).

Petitioner contends that he was denied the right to Appeal the eight years consecutive sentence as imposed by the Honorable Judge Platt, Jr., Eastern District of New York within the ten day time limit pursuant to Title 28, U.S.C., Sec. 636, due to the failure of the Court and petitioner's court-appointed counsel, Mr. O'Brien's failure to advise the petitioner of his lawful and constitutional right to Appeal and offers the below in support of his contention.

1. Upon the completion of sentencing, neither the Court, The Court Clerk or Defense Counsel advised your petitioner of his lawful and constitutional right to appeal within the prescribed time limit set by law.

2. Shortly after sentencing, petitioner and two co-defendant's, Connie Collins and Paul Plamia were conversing with Counsel's Mr. Gilbert and Mr. Steinberg and counsel Mr. Eugene Mastropieri (Counsel for two co-defendant's who elected to go to trial). Petitioner advised Counsel's to appeal his consecutive eight year sentence for the following reasons:

"A". Petitioner stated to Counsel's that the trial Judge had no Authority to predicate the eight year consecutive sentence upon the evidence and/or testimony adduced at co-defendant's trial as the petitioner had "Plea-Bargained".

"B". Petitioner should have been sentenced prior to the commencement of trial of co-defendant's who had elected to go to trial rather than "Plea-Bargain".

"C". The sentencing Judge presiding at trial of co-defendant's had taken into his consideration and deliberation all of the trial testimony illicited at said trial by the prosecution's Major Witness (Mr. Paul Fleisher, a co-conspirator but not a co-defendant).

Certain testimony was illicited from the prosecution witness that could not be "Objected" to by your Petitioner who elected to "Plea-Bargain" and not engage in trial.

This testimony, which amounted to a separate and distinct charge not included in Ind. No. 75 CR 275, was not "Objected" to at trial by Defense Counsel's for those who elected to go to trial, i.e., co-defendant's Mastrangelo and Aiboloria.

This testimony, perforce, had effect upon the sentencing Court's determination therein and, thus, was prejudicial to petitioner and sentencing thereof.

Petitioner while engaged in conversation with your petitioner's co-defendant's counsel's, Mr. Steinberg and Mr. Corbett plus counsel Mr. Mastroperi, counsel Mr. Corbett emiquivocally stated that:

> Petitioner's could "Not Appeal" the sentence as they had "Plea Bargained", but could insert into the Court a "motion for a modification and/or reduction in sentence" within the prescribed one hundred twenty day time limit prescribed by law.

Failure of the Court, The Court Clerk and/or Defense Counsel's to advise your petitioner of his lawful and constitutional right to Appeal sentencing denied your petitioner Due Process and Equal Protection of Law.

Petitioner petitioned the Honorable Judge Thomas Platt, Jr., Eastern District Court, pursuant to Rule 35 of the Federal Rules of Procedure for a modification and/or reduction in sentence, citing disparity and severity in sentence as opposed to those co-defendant's who elected to go to trial and were found "Guilty" on all counts obtained there-in. Petitioner's petition for modification and/or reduction in sentence was denied by the Honorable Judge Thomas Platt, Jr. Petitioner has re-submitted a petition to the Eastern District Court, Honorable Judge Thomas Platt, Jr., citing Other Contentions. Petitioner is awaiting the outcome of that Court's decision.

Petitioner has since become knowledgable that he did and does have a legal and constitutional right to appeal and should have been made aware of this right either through the Court and/or Counsel of record at sentencing.

Petitioner contends that the failure of the Court, The Court Clerk and Defense Counsel to advise the petitioner of his legal and constitutional right to appeal denied the petitioner Due Process and Equal Protection of Law as enumerated in the Fourteenth Amendment of the United States Constitution.

...o, petitio or prays this Honorable Court will in the interests of ... constitutuinal rights grant him the right to appeal the sentencing ...ntence out of time, in lieu of timely notice accordingly. Further, that ...irt appoint counsel under the Criminal Justice Act to perfect said Appeal.

Respectfully submitted,

Charles Peters

Charles Peters-Pro-Se
Drawer "B"
Stormville, New York,
12582

State of New York:
County of Dutchess:
Sworn to before me

This 16 Day of March 1976

Esmond W. Gifford

Notary Public

ESMOND W. GIFFORD, SR.
Notary Public, State of New York
Dutchess County
Commission Expires March 30, 1977

Original: Clerk of Court, Pro-Se
Brooklyn, New York, 11201

C.C. : United States Attorney's Office
Brooklyn, New York, 11201
225 Cadman Plaza, East.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Respondent

- against -

Charles Peters, N.Y.S.-20273 - 76 C 549
Gerard Collins, N.Y.S.-20434 - 76 C 545
Paul Flammia, N.Y.S.-19482 - 76 C 593

Petitioners

Petitioners, Peters, Collins and Flammia respectfully Traverse in the above order United States Attorney Mr. Ethan Levin Bernstein's Affidavit in Opposition dated the 30th day of April 1976 and received by the petitioners the 1st day of May 1976.

Item No. 1: No Traverse.

Item No. 2: No Traverse

Item No. 3: The Governments affidavit in opposition labels petitioner's action a type of, "boilerplate" application from each of the three co-defendants. The fact is there are three defendants in the same action, thus necessarily a need to "personalize". Using the Government's reasoning, it may well be claimed that the initial prosecution, in view of the "exact" photostatic copies of "the indictments, etc., indicate a lack of sincerity and authenticity in the claims made". Surely, the fallacy of the Government's contention is obvious as misleading re. the facts of the action.

Item No. 4: The Government dwells on "advise of counsel" issue, to the exclusion of the substantive right to appeal: In U.S. ex rel. Duncan 377 F Supp 751 it cites this substantive right is denied when petitioners are not advised of this right and privilege to appeal - in - Johnson -v- Zerbst 304 U.S. 458 - 58 S. Ct.

petitioners did not waive an intentional relinquishment of [illegible] known right or privilege,

Such an approach by presuming a waiver of a fundamental right from inaction is inconsistent with the Court's pronouncements on waiver as, an intentional relinquishment or abandonment of a right or privilege. Courts should "indulge" every reasonable presumption against waiver and they should require compliance in the loss of a fundamental rights, In - Carnley -vs- Cochran 369 U. S. 506 - 82 S. Ct. 884, the Court held proving waiver from silent record is impermissible, petitioners' right to sentence in the light of the facts pertinent to each defendant exclusive of whatever may have been adduced in trials of others which, under the circumstances, were not, as they could not be, challenged by petitioners herein. Factually, extraneous matters adduced at trial of others were not known to petitioners, bringing into the present action a question of suppression materially.

Item No. 51 — Petitioners have made a showing sufficient to meet the requirements herein, namely that sentence was predicated grossly upon "trial testimony illicited at" trial of co-defendants, clearly coming under the aegis of illegality or incorrectness.

Item No. 61 — Petitioners' requests towards resentence apply insofar as the request involves a resentence commensurate with the facts exclusive of any extraneous matter adduced at trial of others. This applies explicitely, since the pleas of guilt were entered accordingly. Needless to say, prejudice is obvious, and for the Government to contend that petitioners must express a basis for an obvious and apparent prejudice, is to beg the question.

[illegible] of the District Courts to "advise" a defendant of his rights to appeal in accordance with the rules [illegible]

address a higher jurisdiction accordingly. This fact, amplified with the fact of petitioners voiced desire to appeal at the time of sentence, should negate any claim by the Government to the contrary. Prejudice to the extent of a probable increased sentence should be sufficient to trigger the Court's intervention as requested by petitioners, Re. Page -v- U. S. 443 F2d- 731 where sentencing was based upon information received "after plea" constitutes or is homologous to an "involuntary plea". Prejudice to the extent of a denial of rights should invoke the Court's intervention accordingly.

Item No. 7: Wherefore, petitioners respectfully request this Honorable Court grant the applications submitted, and that the relief be granted accordingly.

Petitioners respectfully request this Honorable Court will grant an evidentiary hearing to ascertain the validity of the facts contained here-in.

Respectfully submitted,

Charles Pet[illegible]

Gerard Collins - [illegible]

Paul [illegible]

State of New York:
County of Dutchess:
Sworn to before me
This 7 Day of May 1976

Richard L. Middlesbrook
Notary Public

RICHARD L. MIDDLESBROOK
Notary Public
Dutchess County
My Comm. Expires Mar. 30, 1977

Edmund Oken
Notary Public

SO ORDERED:
Dated: Brooklyn, New York

_____, 19___

_____
U.S.D.J.

Affidavit in Support

Petitioners, Charles Peters and Gerard Collins being duly sworn deposes and says:

They are the petitioners in the entitled action and respectfully advise this Honorable Court of the following set of circumstances surrounding the lack of petitioner Flamia's signature on the Original enclosed Traverse.

Petitioner's, Peters and Collins are residents of Greenhaven while petitioner Flamia is a resident of Fishkill Facility. Due to the ten day time limit and petitioners residence's in seperate Institutions, petitioner's Peters and Collins had the enclosed papers notarized in Greenhaven and sent directly to the Southern District Court to comply with the ten day time limit. Petitioners Peters and Collins have sent a copy of the Traverse to petitioner Flamia for his signature and notarization. His signed and notarized copy of the Traverse will be slightly delayed due to these extenuating circumstances and may not reach the Court within the exact ten day time limit. However, petitioner Flamia does associate himself not only to the Entitled Action but also associates himself to the entire contents contained there-in, in the enclosed Traverse.

Therefore petitioner's respectfully pray this Honorable Court will grant a forty eight hour extension of time for petitioner Flamia's signed and notarized copy of Traverse to be submitted to Court.

Said copy of petition will unequivocally show petitioner Flamia's acquiescence to the contents contained there-in.

Respectful ly submitted

Charles Peters

Gerard Collins

State of New York
County of Dutchess
Sworn to before me
this 7 day of May 1976

Richard L. Middlebrook

RICHARD L. MIDDLEBROOK
Notary Public
Dutchess County
My Comm. Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

GERALD COLLINS,

Petitioner,

76 C 545

-against-

THE UNITED STATES OF AMERICA,

Respondent.

- -x

CHARLES PETERS,

Petitioner,

76 C 549

-against-

THE UNITED STATES OF AMERICA,

Respondent.

- -x

PAUL FLAMMIA,

Petitioner,

76 C 598

-against-

THE UNITED STATES OF AMERICA,

Respondent.

- -x

G

MEMORANDUM AND ORDER

PLATT, D.J.

Petitioners, pro se, have filed motions to vacate, set aside or correct the sentences previously imposed upon them by this Court. Title 28 U.S.C. § 2255. The three cases were consolidated because each raises the identical issue of whether petitioners were denied the effective assistance of counsel.

Collins, Peters and Flammia each pled guilty to Count One of Indictment 75 CR 275 (use of a firearm in the commission of a felony [theft of goods from a motortruck in interstate commerce] in violation of 18 U.S.C. § 924(c)(1)(2)). Each was sentenced to a term of incarceration to be served consecutively to the State prison term they were already serving.

The gravamen of petitioners' motion is that they were denied due process of law because neither their counsel nor the Court, at the time sentence was imposed, advised them of the right to appeal their respective sentences. Each petitioner was represented by assigned counsel pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A. Petitioners allege that they requested their respective counsel to appeal their sentences because: (1) they were not sentenced until after their co-defendants' trial was completed; and, (2) the Court predicated their sentences on information gained from hearing the co-defendants' trial which denied petitioners the opportunity to rebut trial testimony which prejudiced them in the eyes of the Court.

Petitioners contend that in their presence, Collins' attorney, John Corbett, Esq., stated to them that they had no right to appeal a sentence imposed after a guilty plea and that a Rule 35 motion was their only remedy if they thought that the sentences were too harsh. Allegedly, when Corbett told them that they had no right to appeal the other counsel were present and did not speak up to correct Corbett's statement. Thus, petitioners contend that they were led to believe that they had no right to appeal their sentences. According

to petitioners, by the time they found out that they did have a right to appeal, the time for filing an appeal had lapsed; and therefore, petitioners argue that their right to appeal has been frustrated by ineffective assistance of counsel.

The Government's answer to the motion argues that each petition is identical "boilerplate" and evidences a "lack of sincerety". Additionally, it is contended that the petitions contain self-serving allegations and are replete with conclusory statements and that, since the allegations are not supported by extrinsic evidence and there is no affidavit from the attorneys involved, petitioners have failed to meet their burden of setting forth specific facts which they are in a position to establish by competent evidence. Dalli v. United States, 491 F.2d 758 (2d Cir. 1974). Therefore, the Government argues, the failure to set forth specific facts requires this Court to dismiss the petitions.

Because a motion pursuant to Section 2255 is a collateral attack on the judgment of conviction or sentence, the burden is on the petitioners to establish a basis for relief on the grounds set forth in the statute. Consequently, to be successful on this motion the petitioners must allege substantial issues of fact, which, if proven, would entitle them to the relief they seek. See Taylor v. United States, 229 F.2d 826 (8th Cir.), cert. denied, 351 U.S. 986 (1956); United States v. Pisciotta, 199 F.2d 603 (2d Cir. 1952). In determining whether to grant an evidentiary hearing on the petition, the Court is mindful of its obligation to do so "[U]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." Title 28 U.S.C. § 2255. See Torres v. United States, 370 F.Supp. 1348 (E.D.N.Y. 1974).

Since petitioners argue ineffective assistance of counsel it is doubtful that an affidavit from their attorneys would support their claim. If such an affidavit had been submitted, three possible alternatives suggest themselves: (1) a denial that such advice was given; (2) a statement that an appeal was discussed but that petitioners instructed counsel not to appeal; or, (3) a statement that such advice was given. If either of the first two alternatives were the contents of the affidavit a hearing would be required to resolve the issue of fact. If the third possibility were the answer, there would be no question of fact but rather a question of law as to whether petitioners were denied effective assistance of counsel by the advice.

The initial question to be determined is whether petitioners sufficiently meet the custody requirements of Title 28 U.S.C. § 2255 to confer jurisdiction on this Court to consider the merits of petitioners' contentions. As previously stated, petitioners are in State custody and have yet to begin serving their federal sentences. Section 2255 states in pertinent part, "A prisoner in custody under sentence of a court established by an Act of Congress . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence" (emphasis added). The Eighth Circuit has held that a district court does have jurisdiction to hear a petition under circumstances similar to the case sub judice. In Jackson v. United States, 423 F.2d 1146, 1149 (8th Cir. 1970), a defendant had been sentenced to three years imprisonment to run consecutively to the State sentence he was already serving. The district court dismissed the petition without prejudice to renew the petition after the petitioner was in federal custody

and serving his federal sentence. In reversing the lower court, the Eighth Circuit held that the rationale of Peyton v. Rowe, 391 U.S. 54 (1968), involving a section 2241 habeas corpus petition, should be extended to section 2255 proceedings:

> "'Custody' under Peyton v. Rowe, supra, relates to a petitioner's 'status for the entire duration of [his] imprisonment'. Under these circumstances, we think the petitioner, a state prisoner, may challenge his federal sentence although he has yet commenced to serve that sentence."

The First Circuit also adopted the extension of the Peyton holding to a section 2255 proceeding in Desmond v. United States Board of Parole, 397 F.2d 386, 389 (1st Cir.), cert. denied, 393 U.S. 919 (1968):

> "In Peyton v. Rowe, . . . the court held that a defendant while serving the first of two consecutive sentences could attack the second. It does not seem to us a significant stretch to say that he may attack a federal sentence, yet to be served, while defendant is in custody completing a state sentence. The same principles which dictated Peyton v. Rowe, seem to us to support jurisdiction here. To be sure, defendant is not physically 'in custody under sentence of a court established by Act of Congress', but if custody is to be construed as single and continuous, we may join the courts as well. There is just as much reason to resolve the legality of resumed incarceration under an existing sentence before such resumption occurs as to resolve the legality of continued incarceration under a consecutive sentence yet to commence."

The Sixth Circuit in Simmons v. United States, 437 F.2d 156, 159 (6th Cir. 1971), has also extended the Peyton rationale to section 2255 proceedings, "We agree with the First and Eighth Circuits' construction of section 2255 and therefore join them in holding that 28 U.S.C. § 2255 is available to a prisoner in state custody attacking a federal sentence scheduled to be served in the future." Although the

Second Circuit has yet to express its opinion as to this issue it has held, in a section 2241 habeas corpus proceeding, that a prisoner in federal custody may attack a State sentence yet to be commenced. United States ex rel. Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971). We agree that the logical extension of the Supreme Court's holding in Peyton points to the conclusion that petitioners are not barred from seeking relief from this Court prior to the completion of their State sentences. Therefore, we proceed to a consideration of the merits of petitioners' argument.

The starting point in our consideration of petitioners' case is an acknowledgment that an appeal from a judgment of conviction in the federal courts is a matter of right. In Coppedge v. United States, 369 U.S. 438, 441-42 (1962), the Supreme Court held:

> "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right. That is, a defendant has a right to have his conviction reviewed by a Court of Appeals, and need not petition that court for an exercise of its discretion to allow him to bring the case before the court. The only requirements a defendant must meet for perfecting his appeal are those expressed as time limitations within which various procedural steps must be completed."

Furthermore, the fact that petitioners pled guilty does not foreclose them from an appeal. See e.g., United States v. Brown, 479 F.2d 1170 (2d Cir. 1973). While appellate opinions continue to adhere to the doctrine of nonreview of sentences if the sentence is within the statutory maximum (See e.g., United States v. Sweig, 454 F.2d 181 (2d Cir. 1972); United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), cert. denied,

344 U.S. 838 (1953)), recent cases have made a distinction between review of the length of a sentence and review of the factors considered in arriving at a particular sentence. See e.g., United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948); United States v. Schwartz, 500 F.2d 1350 (2d Cir. 1974); United States v. Driscoll, 496 F.2d 252 (2d Cir. 1974); McGee v. United States, 462 F.2d 243 (2d Cir. 1972); United States v. Holder, 412 F.2d 212 (2d Cir. 1969). In Holder, supra, the Second Circuit, although recognizing the long line of precedent holding that the length of a sentence imposed by a district court is non-reviewable, stated:

> "If the sentence could be characterized as so manifest an abuse of discretion as to violate traditional concepts, it is possible that we might, pursuant to our power to supervise the administration of justice in the circuit, overturn our long established precedents of non-intervention and intervene." 412 F.2d at 215.

See also United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970). Furthermore, appellate review of sentences is common where the sentencing court has failed to follow proper procedure in imposing sentence.

Assuming that petitioners were entitled to appeal their sentences at the time they were imposed, the Government argues that petitioners must now show a non-frivolous appeallate issue in order for the Court to grant relief. However, in Rodriguez v. United States, 395 U.S. 327, 330 (1969), the Supreme Court reversed a Ninth Circuit opinion which held that before a frustrated appeal could be reinstated

via a section 2255 proceeding some showing of merit to the appeal had to be made:

> "The Ninth Circuit seems to require an applicant under 28 U.S.C. § 2255 to show more than a simple deprivation of this right before relief can be accorded. It also requires him to show some likelihood of success on appeal; if the applicant is unlikely to succeed, the Ninth Circuit would characterize any denial of the right to appeal as a species of harmless error. . . . Moreover, the Ninth Circuit rule would require the sentencing court to screen out supposedly unmeritorious appeals in ways this Court rejected in Coppedge. Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the courts below erred in rejecting petitioner's application for relief because of his failure to specify the points he would raise were his right to appeal reinstated."

Therefore, it is clear that a determination as to the merit or lack of merit in petitioners' appeal is not a question which should concern this Court. Rather, the question is simply whether there has been a frustration of the right to appeal. See United States ex rel. Williams v. LaValle, 487 F.2d 1006, 1010 (2d Cir. 1973), cert. denied, 416 U.S. 916 (1974); United States ex rel. Smith v. McMann, 417 F.2d 648, 654 (2d Cir. 1969)(en banc), cert. denied, 397 U.S. 925 (1970).

Finally, the question remains as to what standard should be applied in reaching a determination as to whether petitioners have been denied effective assistance of counsel.

In Anders v. California, 386 U.S. 738, 744 (1967), the Supreme Court set out the procedure to be followed by counsel who thought that the filing of an appeal from a criminal case was frivolous. There, the Court stated:

> "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. . . . His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court - not counsel - then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal."

In United States ex rel. Randazzo v. Follette, 444 F.2d 625, 629 (2d Cir.), cert. denied, 404 U.S. 916 (1971), a State prisoner habeas corpus proceeding, the Second Circuit pointed out that the "conduct such as to shock the conscience of the court and make the proceedings a farce and a mockery of justice" standard normally applied when ineffective assistance of counsel is alleged, does not control on the issue of whether an appeal has been frustrated:

> "Had Dickman [counsel] consulted with Randazzo [defendant] as to the usefulness of the appeal and if Randazzo had then, after consultation with counsel, decided not to appeal, it is clear that the merits of the appeal would be quite relevant to the quality of Mr. Dickman's representation and advice. However, this is not the case before us. Randazzo claims that Mr. Dickman unilaterally decided not to prosecute the appeal without giving any notice to him. While counsel may not need to consult with his client on all tactical aspects of an appeal, clearly the client should be informed that counsel has decided to abandon the case so that a client may find alternative means of representation if he so desires. Thus, if Randazzo was indeed unaware of Mr. Dickman's decision not to perfect the appeal, he was deprived of his right to effective assistance of counsel. . . . [A] hearing is required to determine the facts on this issue."

Other Circuits as well have held that the failure by defense counsel to pursue an appeal, when requested to do so, amounts to frustration of the right to appeal and ineffective assistance of counsel which requires the granting of relief. See e.g., Kent v. United States, 423 F.2d 1050 (5th Cir. 1970); Cartwright v. United States, 410 F.2d 122 (6th Cir. 1969); Jenkins v. United States, 399 F.2d 981 (D.C. Cir. 1968).

The issue of whether petitioners' right to appeal was frustrated by counsels' advice presents a factual issue which must be resolved by a hearing. Accordingly, it is

ORDERED that a hearing be held at 2:00 PM on October 1, 1976, to determine the issues of fact as outlined above.

It is further ORDERED that Stephen Flamhaft, Esq., is hereby appointed to represent petitioner Peters; Mark A. Landsman, Esq., is hereby appointed to represent petitioner Collins; and, Raphael Scotto, Esq., is hereby appointed to

represent petitioner Flammia.

The Clerk of the Court is directed to forward a copy of this Memorandum and Order to each of the petitioners, to the United States Attorney for the Eastern District of New York, and to petitioners' newly and formerly appointed counsel.

Kevin C. Duffy

U.S.D.J.

August 16, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

- against -

GERALD COLLINS, PAUL FLAMMIA and CHARLES PETERS,

Defendants.

76-C-545
76-C-549
76-C-598

- x

United States Courthouse
Brooklyn, New York

October 8, 1976
2:00 P.M.

B E F O R E:

HONORABLE THOMAS C. PLATT, U.S.D.J.

A P P E A R A N C E S:

DAVID G. TRAGER, ESQ.
United States Attorney
For the Eastern District of New York
BY: ETHAN LEVIN-EPSTEIN, ESQ., of Counsel

MARK LANDSMAN, ESQ.
Attorney for Deferdant Collins

RAFAEL SCOTTO, ESQ.
Attorney for Defendant Flammia

MR. FLAMHALF, ESQ.
Attorney for Defendant Peters

Maurice S. Davis
Acting Official
Court Reporter

because Mr. O'Brien was not named in the moving papers, we should dismiss?

MR. LEVIN-EPSTEIN: And that was a mistake. In fact, Mr. Peters does name his attorney in the moving papers, but admitted in his statement under oath, in an affidavit form as erroneous or perjurous that he does not now claim that his attorney didn't give him ineffectual counsel.

MR. FLAMHALF: I think if we have to look at the state of mind of the petitioner at the time he received that information, I don't think it's a question of whether or not --

THE COURT: He, himself, said he never consulted his attorney on the question.

MR. FLAMHALF: That's conceded.

THE COURT: How can his attorney be ineffective as to that if he never consulted him?

MR. FLAMHALF: Probably, technically, Mr. Levin-Epstein's position is right, but any client can be denied because he relied upon some person.

THE COURT: He can't rely on someone else's attorney.

MR. FLAMHALF: Mr. Corbett is quite a competent --

THE COURT: Assuming that he is, for the sake of

argument about Mr. Corbett is true, he can't rely on Mr. Corbett's advice. He is not his attorney.

MR. FLAMHALF: You're absolutely correct. I have no answer to that. It's a state of mind of the defendant at the time.

THE COURT: That doesn't prove that Mr. O'Brien was incompetent. He is saying that he did not get ineffective counsel. He never asked Mr. O'Brien.

MR. FLAMHALF: Somebody said it.

THE COURT: It has to be his attorney, that is in the case. If you will look at the past testimony, he received this from somebody else.

MR. FLAMHALF: He had no reason to believe it wasn't valid.

THE COURT: You can't rely on somebody else's counsel. It is something like when you get a piece of advice from an attorney at a cocktail party, over a martini. It's worth exactly what you pay for it.

MR. FLAMHALF: I wouldn't send a fee for it either. It certainly is from the same set of facts. The sentence was on the same day. Apparently, Mr. Corbett had said that he was the first one back there.

THE COURT: You can't rely on Mr. Corbett. He is not his attorney. The petition is that he was denied

effective assistance of counsel. There was no discussion between him and his counsel.

MR. FLAMHALF: Blame him for not asking his own attorney, but don't blame him for not receiving proper advice.

THE COURT: There is no suggestion --

MR. FLAMHALF: That's the point. Mr. O'Brien never spoke to him.

MR. LEVIN-EPSTEIN: That's a matter of fact for the Court to decide.

THE COURT: They both agreed that they discussed the motion for reduction of sentence.

MR. FLAMHALF: Agreed. He asked on the motion to reduce. The question is whether or not he received the information from John and relied on that information.

THE COURT: It has nothing to do with O'Brien. I don't see it.

MR. FLAMHALF: I think it's a frivolous motion by the government.

THE COURT: It's very important as far as issues. I don't think he has any technical basis for being here.

MR. FLAMHALF: If we are going to dismiss the standing on a technical ground -- relying on another attorney --

THE COURT: It is not technical. The ground is that he was providing ineffective assistance of counsel, and there is no testimony here that he was by his counsel. I think the same -- it's not the same case in Flammia, because Mr. Flammia says Mr. Scheinberg was standing alongside of him when the advice was given.

MR. FLAMHALF: I think it's just unfair to dismiss the substantial right of a defendant based on the fact he alleges in the paper one attorney as opposed to another.

THE COURT: As a practical matter, I think you are confronted with the allegation of your client's pleading. You have got to overcome it.

MR. LEVIN-EPSTEIN: Your Honor, the government --

THE COURT: Do any of the present counsel have the wish to submit anything on this motion?

MR. LANDSMAN: Your Honor, may I speak to Mr. Flamhalf for just a moment?

THE COURT: Yes.

MR. LEVIN-EPSTEIN: Of course, the Court recognizes, of course, that this petition is only a preliminary opposition and only marks opposition as to Mr. Peters' motion. Of course, the government still opposes on the issue of the merits and credibility.

MR. FLAMHALF: Well, Your Honor, the point is well made by co-counsel that Mr. O'Brien was present and said nothing at the time. Apparently he said nothing at the time that Mr. Corbett was allegedly advising --

THE COURT: Not according to Mr. Peters. He came in afterwards, according to your own witness.

MR. FLAMHALF: Can we resubmit if he changes the name on the allegation that it was not Mr. O'Brien but was Mr. Corbett because Mr. O'Brien --

THE COURT: He cannot rely on advice from someone else. It's not his counsel. It is not ineffective assistance by his counsel.

MR. FLAMHALF: If we look at the subject state of mind of my client, that is what must be considered.

THE COURT: This is not his objective state of mind. We are determining whether or not he had effective assistance of counsel, not the state of his mind.

MR. LEVIN-EPSTEIN: If Mr. Mastropierri had turned to Mr. Peters, Mr. Collins and Mr. Flammia, look you can beat this sentence. To move for a new trial would then be proper on relying on Mr. Mastropierri or even my advice.

THE COURT: Of course not.

MR. FLAMHALF: That's not the issue.

THE COURT: It's illustrative of your problem.

MR. LEVIN-EPSTEIN: Mr. Corbett says he didn't say it at all.

THE COURT: Assuming Mr. Corbett said what your client and others said he said, he was only giving advice to his client; period.

MR. FLAMHALF: I think it's a very, very fine line, and I think the defendant was unjustly punished by that.

THE COURT: I'm not punishing anyone. You have got to overcome. Is there anything you want to add to the record?

MR. LEVIN-EPSTEIN: I would like to respond to one other point that was raised by Mr. Flamhalf, briefly, for the record.

After having his discussion with Mr. Landsman and Mr. Scotto, Mr. Flamhalf posits to the Court that there was a failure in some course by Mr. O'Brien because he failed to advise him by standing mute in this context. If Mr. Flamhalf's argument is taken to a logical conclusion, I submit to the Court, we will be here subsequent to every sentencing until the very late hours while the lawyers advise their clients about the possibility of a 2255 motion; the possibility of raising constitutional

STATE OF NEW YORK, COUNTY OF KINGS

Kris Wolbrum being duly sworn, deposes and says: deponent is not a party to the action, is over the age of 18 years and resides at: 1008 Roder Avenue, Brooklyn, New York 11230.

AFFIDAVIT OF SERVICE (personal)

On November 30, 1976 at 225 Cadman Plaza East, Brooklyn, New York 11201, deponent served the within APPENDIX FOR APPELLANT (CHARLES PETERS) upon the United States Attorney, herein by delivering a true copy thereof to him personally. Deponent knew the person mentioned and described as the U.S. Attorney.

Sworn to before me this 30th day of November, 1976.

Kris Wolbrum

Notary Public
No. 24-5325425
Qualified in Kings County
Term Expires March 30, 1976